No. 1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

J. HARVEY CROW,

Petitioner,

vs.

RICHARD P. FAULKNER ET AL., AS DISBARMENT COMMITTEE,

Respondent.

BRIEF OF RESPONDENT DISBARMENT COMMITTEE TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Statement of Facts 1
Argument 5
Question I (a), (b), (c) 5
Question I (d) 10
Question II (a) 13
Question II (b) 17
Question III 23
Question III (a) 26
Conclusion 32

Cases Cited

Asa Waters v. Commissioners of Hamilton County, 9 O. Dec. Reprint, 5 29

Burch, In re, 73 O. App., 97, p. 100 13

Cincinnati S. & C. R. Co. v. Sloan, 31 O. St., 1 21

Joseph C. Paris v. Frank M. Coppock, et al., 4 O. Circuit Dec., 654, p. 655 30

Lieberman, In re, 163 O. S., 35, p. 42 ..... 7, 13
Linthicum, In re, 32 O. L. R., 253, Annotated 20

Ohio Constitution, Sec. 3, Art. IV 14, 27

Quimby, In re, 18 O. App., 142, p. 144 13

State ex rel. Crotty v. Zangerle, 64 O. App., 511, pp. 514-515 14

State ex rel. Hawke v. LeBlond, O. St., 126, pp. 134, 135, 136 14
State ex rel. Joseph v. Crossland, 152 O. S., 199..... 20
State v. Rohrer, 90 O. S., 167..... 30
Tari v. The State of Ohio, 117 O. S., 481, 2nd syll., pp. 491 and 496 25
Thatcher, In re, 190 Fed., 659..... 23

Texts Cited

72 C. J. S., p. 982, Sec. 1..... 6
26 A. C. J. S., 289, Sec. 3..... 8
32 O. Jur., p. 612, Sec. III.....17, 20
157 O. S., pp. XLIII through LXXII..... 18
Corp. Jur. 2nd, 48, p. 1022, Sec. 58..... 19

Statutes Cited

Revised Code of Ohio—
Section 141.07 7
Section 1313.07 21
Section 2107.13 21
Section 2109.24 21
Section 2109.25 21
Section 2301.02 18
Section 2307.01 22
Section 2307.03 22
Section 2309.01, et seq..... 7
Section 2319.01 8
Section 2319.05 .....8, 11
Section 2319.06 8
Section 2319.15 8
Section 2319.16 8
Section 2319.26 8
Section 2701.03 .....7, 18, 24, 25

Section 2701.04 18
Section 2735.01 21
Section 3513.05 18
Section 4705.01 .....17, 19, 20, 21, 22
Section 4705.02 18
Section 4705.03 .....5, 7, 19, 20, 21, 22
Section 4705.05 19

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STATEMENT OF FACTS

This Disbarment Committee is somewhat at a loss in this petition of writ of certiorari, as Mr. J. Harvey Crow, petitioner, continually refers to matters he says appear in his "Application for extension of time", which Mr. Crow did *not* furnish to this Committee.

At the outset let us say this was Mr. Crow's second disbarment. He was first disbarred by the Stark County Common Pleas Court in 1935. He was reinstated in 1949 and again disbarred in Champaign County in 1955.

This Committee does not believe that there is any matter requiring review by this court or that petitioner is specially setting up any title, right, privilege or immunity claimed under the Constitution or statutes of the United States.

All of the matters raised here were raised by Mr. Crow time and again before the Ohio courts including the Supreme Court. None of them were found to have any merit. Most of the matters have been decided many times and for many years in Ohio.

The only question not before determined was the filing of an affidavit of prejudice against the trial court a year after the trial was over. The statutes in Ohio are clear that such affidavits must be filed before trial or at the earliest opportunity during trial. Notwithstanding this irregularity the Chief Justice of the Supreme Court granted him a hearing, at which he refused to offer any evidence, and the affidavit was therefore dismissed. The question then became moot.

As far as the facts are concerned this action in disbarment was commenced in Champaign County under authority of the statutes which state any judge of any state court is required to cause proceedings to be instituted when it comes to his knowledge that any attorney may be guilty of any of the causes for disbarment.

The charges were filed February 5, 1955, by the Disbarment Committee, based mainly on previous investigations of the Champaign County Bar Association Grievance Committee. Crow was served personally with notice on February 14, 1955, and also by registered mail. The cause was set for *trial* on April 18, 1955, by journal entry dated February 23, 1955, of which Crow was immediately notified

in writing and by personal telephone call from the judge of the Common Pleas Court. This gave him more than 2 months to prepare for trial. The local judge disqualified himself and 3 judges were appointed from widely scattered counties by the Chief Justice of the Supreme Court to hear the cause.

He elected to wait until April 16, the Saturday before the Monday on which trial was to begin to file his motion to quash service of summons. This motion was overruled on Monday and Crow was ordered to trial. Crow not only had resided in Champaign County for a number of years, until shortly before the disbarment action was filed, but still had an office in Champaign County (Urbana) at that time and was then engaged in a number of cases in the county courts.

Crow interposed many motions and objections, all of which were ruled on by the court.

Two of the matters on which he now relies are (1) he was not granted a continuance to bring in additional counsel; (2) he was not granted a continuance for depositions.

As to (1), he made no showing to the court as to the identity of additional counsel, and produced no statement to the court from any such attorney. He was represented by 2 attorneys.

As to (2), he had 2 months to obtain depositions if he wanted them. It is also interesting to note that the trial was adjourned for a period of 18 days during which time he took no depositions.

Crow states in his petition that "he had hundreds of clients and was opposed by numerous lawyers without complaint." The charges could not have been made up if there had not been complaints. He further states that many lawyers said his conduct was honorable and proper. He

produced *not a single one* at trial to testify as to his general reputation as a lawyer, although he subpoenaed 46 witnesses including several Common Pleas Court and Appellate Court judges.

The practice of law is a privilege, not a right. The practitioners are required to maintain certain high standards of ethical conduct. The real question involved is, did or did not J. Harvey Crow do the acts charged as a reason for his disbarment? The Ohio courts found that he did, and disbarred him.

The questions will be considered in detail.

ARGUMENT

QUESTION No. I (a), (b) AND (c)

The substance of the whole matter is that petitioner claims the trial court erred in not granting a continuance at petitioner's request. In support of this claimed error he recites that the visiting judges assignment was filed April 18, 1955; that a motion to quash "service of summons" had been filed; he desired to take depositions; file a demurrer, a motion to strike and to make definite and certain; also that "certain counsel" were not available on April 18 or 19; accused was in Cleveland, 200 miles away, and to give time for preparation of a written answer.

The record and transcript shows that specifications were filed February 5, 1955; that notice of the filing and a copy of the charges were served personally on petitioner on the fourteenth day of February; the cause was assigned for trial on April 18, 1957; notice of the trial assignment being given to petitioner on the twenty-first day of February, 1955; that he did nothing until April 16, 1955, when the motion to quash was filed.

The Committee first observes that a "summons" was not served upon accused. The paper served was a copy of the written charges, certified by the clerk of courts as required by R. C. 4705.03.

This section provides:

> "Before an attorney-at-law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel."

Although this does not constitute the service of a "summons", it is probably included within the term "process":

> "A notice may be designated as a process where it is given by authority of law for the purpose of acquiring jurisdiction of the defendant." 72 *C. J. S.*, p. 982, Sec. 1.

Accused complains that the judges filed their assignments to sit in the disbarment case on Monday, April 18, 1955. However that may be, the Champaign County Court of Common Pleas was open for business during the usual times from February 5, 1955, to April 18, 1955, and accused could have filed any proper pleadings or motion with the clerk of that court during that time. It appears that more than sixty days elapsed between the date when the charges were served upon the accused and the time assigned for trial. The statute referred to above provides that the interval between service and trial shall be reasonable:

> "After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense * * *"

From a reading of petitioner's brief one would gather that he made no effort to "collect testimony" during the more than sixty days but decided to rely on his motion which he hoped by late filing (Saturday preceding trial date) would compel the Committee to ask for a continuance. Instead the Committee prepared a memorandum which was filed Monday morning and the matter was submitted immediately to the court which overruled the motion and ordered the cause to trial as assigned more than sixty days before.

Petitioner gives as a reason why his motion to continue should be sustained the filing of the assignment made by the Chief Justice. We believe these assignments are

usually made by letter and not by formal order. We assume the letters are filed as a matter of proof in order to be paid the additional compensation provided in R. C. 141.07. The Chief Justice seems to act under authority of R. C. 2701.03 although in this case the resident judge disqualified himself. We believe this could not possibly be used as a proper ground for a continuance.

The other items, taking depositions, demurrers, motions to strike, make definite and certain, file an answer and attach interrogatories seem to fall within a pattern whereby accused is attempting to apply the Chapter on pleadings, R. C. 2309.01, et seq., to a disbarment proceedings. This comes about from his failure to properly read the holding in the *Lieberman* case (163 O. S., 35) and particularly at page 42 of the opinion where Judge Bell states:

> "This court has held that a disbarment proceeding is not a chancery case. In re Hawke, supra. Nor is it a criminal proceeding. It is a purely statutory proceeding, neither civil nor criminal, instituted by order of the court to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law."

In this case it is clearly stated that disbarment is "neither civil nor criminal". The only reason for this discussion was to establish the rule as to the weight of the evidence required to disbar. We believe, therefore, that none of the provisions as to answer, motions, etc., are applicable.

Petitioner states that he was unable to take depositions prior to the ruling on his motion to quash as this would constitute an entry of his appearance in the case. He maintains this position although the statute, R. C. 4705.03, requires a reasonable time "to collect and present testimony". A reasonably prudent attorney would have filed the motion forthwith after service of the copy of the

charges. There appears to have been no right to take depositions in law actions under common law practice:

> "At common law the right to depositions in law actions was unknown in the absence of consent, although equity courts have long had power to procure testimony in this manner." 26 A. *C. J. S.*, 289, Sec. 3.

The statutes in Ohio are not very clear as to who has a right to take a deposition. They are completely silent as to use in disbarment actions. Testimony by deposition is allowed (R. C. 2319.01) but can only be used in certain instances (R. C. 2319.05). The time when the taking of depositions can be commenced is fixed by R. C. 2319.06, as "after service upon the defendant." Notice is required to the adverse party (R. C. 2319.15). It can be served upon the adverse party, his agent or attorney (R. C. 2319.16) and it is required to be filed at least one day before the day of trial (R. C. 2319.26).

There appears to be no requirement that any papers or pleadings be filed in court in regard to the taking of depositions and the party can at least withhold the filing until one day previous to trial so that it would seem that the mere giving of notice and the taking of a deposition would not be such an entry of appearance on the merits as to cut off his right to specially challenge the service. Further, the same statute that authorizes the testimony of witnesses by depositions also authorizes testimony by affidavit and there were affidavits annexed to his motion to quash so that, if the taking of a deposition would constitute an appearance on the merits, then the filing of affidavits ought to have the same effect.

Further, there is not found in the record any place where petitioner informed the court as to the names and identity of the persons whose testimony he wanted by deposition, nor is there a statement as to the probable

testimony to be elicited. Several are named in his instant brief but in the one case (Mr. Gillie), the court records were in evidence. In the others, Mr. Shank's son, the father and mother of Mrs. Butcher, and her brother, no word has ever been stated as to what their probable testimony would be, nor did petitioner make any effort to get them into court. Petitioner did not apply to the court for any order to compel any witness to appear, thus the trial court never had the chance to pass on the question. It is very probable that the court would have held that in a disbarment action, because of its state-wide nature, witnesses could be subpoenaed from any place within the state. Failing that, an adjournment would have been made and an order entered to take the depositions upon assurance that the testimony would be germane. The court was not given the opportunity.

Petitioner complains that a continuance was not granted on his statement that "certain counsel were not available on April 18 or 19, 1955, being engaged in trial of other cases." The name of such counsel was not disclosed to the court. The cases in which such counsel were engaged were not identified and there is no record that any counsel claiming to represent petitioner contacted the court either by phone, letter or messenger, requesting a continuance. The further fact remains that petitioner was represented by two able attorneys on April 18, 1955, and that one of these, Reed M. Wingardner, remained at the trial table during the whole eight days of the trial. Since then, Stanley Denlinger of Akron, has appeared in court for him. Each of these must have been of his own choice as the Committee is not aware of any requests being made by petitioner for appointment of counsel to defend him.

The alleged fact that petitioner chose to stay in Cleveland, some 200 miles from Urbana, was not any cause for continuance. It was his own choice. There were no emergencies except those he created himself.

QUESTION No. I (d)

Petitioner claims that he was denied certain rights and not afforded the opportunity by the trial court to prepare and properly present the issues involved and that this amounts to a violation of his constitutional rights under the due process clause. The action complained of was commenced February 5, 1955, in the Common Pleas Court of Champaign County, Ohio, with the filing of specifications. Due notice of the filing of same was served upon petitioner in the following manner: petitioner was served personally and by registered mail on February 14, 1955, with notice of the filing of the specifications and with copies of the specifications themselves. On February 21, 1955, petitioner was notified by Judge Owen by letter and telephone call, of the trial date.

The cause was assigned for trial on April 18, 1955, before a court composed of three visiting judges assigned by the Chief Justice of the Ohio Supreme Court. The notice served on petitioner stated the cause was assigned *for trial* on April 18, 1955, and it seems fair to assume the petitioner, as a prudent person, would consider the possibility of an adverse ruling upon his motion to quash and be prepared for trial at that time. Exactly 63 days elapsed between the time the notice was served upon petitioner and the trial, and 56 days between the notice of the trial date and the trial itself.

It appears to the Committee that the various matters complained of by petitioner arise not because of a disre-

gard of his fundamental rights to a fair and impartial trial and denial of an opportunity to present all of the facts but rather to a failure on the part of petitioner to properly use the interim to dispose of preliminary matters.

The statement is made that a continuance was denied him for the purpose of permitting "certain lawyers" to participate in the hearings and to represent the petitioner. The record discloses that petitioner was represented by two attorneys when the trial began. If other counsel were desired and unavailable at the time, no disclosure was ever made of their names or a statement over their signatures made as to their unavailability.

Petitioner complains that he was forced to proceed to trial without the opportunity of taking depositions. Section 2319.05 and succeeding sections of the Ohio Revised Code prescribe the manner and conditions under which same may be taken. The necessity for any such action was peculiarly within the knowledge of petitioner and his failure to avail himself thereof does not constitute a disregard to his fundamental rights but rather a failure on his part to properly prepare his defense. The trial adjourned from April 20 to May 9, a period of 18 days, during which petitioner made no attempt to secure any depositions.

The same statement can be made with regard to the allegations:

1. That petitioner was not given time to prepare and file a written demurrer.

2. That he was not given time to prepare and file a written motion to make the specifications definite and certain.

3. That he was required to proceed to trial without being given time to prepare and file a written answer. (No answer is required under the statutes on disbarment.)

4. That he was required to proceed to trial without being given the right or granted permission to make oral motions. (The record shows appellant made some 18 oral motions.)

5. That he was required to proceed to trial without time to subpoena witnesses. (46 witnesses were subpoenaed by petitioner.)

Even the fact that petitioner proceeded to trial on April 19, 1955, with only two hours of sleep might have been avoided had petitioner been properly prepared. This could have been accomplished by his giving consideration to the possibility of an adverse ruling on the motion to quash and, having had previous experience in matters of disbarment, this should have occurred to the petitioner.

Petitioner discusses due process, constitutional rights and his claim that he was denied a fair and impartial trial. The fact remains, however, that he did have 64 days to prepare his defense prior to trial; that he did have counsel of his own choice, at least three in number, and that this matter has, to date, occupied the attention of 19 judges.

In the opinion of this Committee, the courts before whom this case has come, have shown petitioner every consideration. The trial was fairly conducted and the yardsticks used have been very long. We must not, however, overlook the object which the courts have in view in cases of this type, which is to remove from the profession persons whose misconduct has proved them unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney. Punishment is not the purpose of disbarment. Disbarment is for the protection of the courts and the public. If petitioner had, through the years, regarded the practice of law more as a high privilege, it would not now be necessary for him to attempt to assert the violation of so many rights.

QUESTION No. II (a)

In this question petitioner takes the position that he should have been tried by only one judge instead of three, although in what particular this would be detrimental to his interests he makes no attempt to assert. He cites R. C. 2315.21 as to trial in civil actions by a three-judge court which respondent does not see has any bearing upon the present disbarment proceeding since it involves civil actions wherein trial by jury has been waived.

As has been previously pointed out in the case *In re Lieberman*, the Supreme Court has distinctly stated that disbarment proceedings are purely statutory and neither civil nor criminal. A disbarment proceeding is not tried to a jury but only to the court. Disbarment proceedings have been heard in the past by various numbers of judges from one judge to at least six. *In re Quimby*, 18 O. App., 142, at page 144 the Court of Appeals notes:

> "In respect to the weight of the evidence, it appears that the cause was tried by five judges in the Court of Common Pleas who presided throughout the trial and concurred in the judgment. This court would naturally hesitate to reverse in such case upon the weight of the evidence."

In re Burch, 73 O. App., 97 at page 100, the court notes:

> "After a very full hearing before a court composed of six common pleas judges, a judgment of disbarment was entered against Burch."

We note also that petitioner raised no objection to the composition of the court before or during trial.

The question of the propriety of a court of three judges sitting in a case has been raised and determined heretofore. In the case of *State ex rel. Crotty v. Zangerle*, 64 O. App., 511, decided by the Court of Appeals for Cuyahoga

County, the specific question of the legal authority of any judge other than the trial judge to participate in the hearing was raised. On page 514 the court states:

> "There appears to be no express inhibition contained either in the statutes or the rules of the court preventing more than one judge from sitting in any matter to be considered by the court. Common practice lends the sanction of custom to common pleas judges sitting en banc in the consideration of matters of importance and we hold that the designation by the acting Chief Justice of three judges to hear the matter under consideration violated no constitutional, statutory or regular provision * * *"

At page 515 the court states:

> "We must recall that, while there is no statutory authorization, except in first degree murder cases and in certain special proceedings, for more than one judge to sit in a hearing of a matter to be considered by the Court of Common Pleas, there is likewise no statutory inhibition against such procedure."

Section 3 of Article IV of the Ohio Constitution provides, in part, as follows:

> "One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary may be held at the same time in any county. *Any judge of the court of common pleas may temporarily preside and hold court in any county.*"

This matter was decided by the Supreme Court of Ohio in the case of *State ex rel. Hawke v. LeBlond*, 108 O. St., 126. In this case, after relator Hawke had been disbarred by a court of three judges of the Common Pleas Court of Hamilton County and on the theory that the judgment entered by the three judges of the Court of Common Pleas

was a nullity, relator thereafter appeared as a counsellor in the Common Pleas Court and tendered his services as an attorney and counsellor in a cause therein pending, and respondent LeBlond, as one of the judges of that court, refused to permit him to appear as an officer of the court and the action designated above was filed to compel respondent to permit the relator to act and serve as an attorney at law.

In considering all of the points that could arise, including power of the Chief Justice to appoint a commission of several judges in a county having only one common pleas judge, the court stated at page 134:

> "If we should sustain the contentions of relator in the instant case, by the same token it would have to be held that all of the permanent orders and judgments entered in all of the counties of the state where more than one common pleas judge has held office during the past twenty-five years were absolutely null and void."
>
> "Parties to litigation have no control or voice in determining the number of common pleas judges who may preside over sessions of the court, that matter being within the unlimited discretion of the judges of each county respectively."

At page 135 the court says:

> "The legislature has never prescribed in minute detail all of the procedure necessary in conducting courts of justice in an orderly manner, and many things must necessarily be left to the sound discretion of the court, and it is of course desirable that as far as possible those details be carried out in an orderly manner and according to a published rule. The implied powers of a court in this respect present a striking analogy to the implied powers of legislative bodies * * * if we should paraphrase the able and far-famed declaration concerning implied powers in that case, and apply the same to the implied and inherent powers of the courts, the following result would be attained. Let the ends be legitimate, let them be within the scope of the ex-

press powers conferred by the Constitution and statutes, and any means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution and statutes, are lawful."

At page 136 the court says:

"We have therefore reached the conclusion that three judges had jurisdiction to hear and determine the controversy in the matter and at the time and place the same was heard."

The only possible point of distinction raised by petitioner is that in Champaign County only *one* judge is elected.

Petitioner's contention would apparently be that in no county at any time, can more judges in number than the number *elected*, hold court.

This is an obvious fallacy. The statutes provide for 3 judges in some instances, in cases where jury is waived and 3 judges requested.

It is a common practice in counties where press of business requires it, to have additional judges assigned in to handle cases. In such situations there may be several more judges in number, holding court, than the *number* elected in the county.

The Article of the Constitution cited, specifies the number to be *elected*, not the number that may hold court; and specifically goes on to say that *any* judge of the Court of Common Pleas may temporarily preside and hold court in *any* county.

QUESTION No. II (b)

Petitioner concedes that the trial court has jurisdiction of the subject matter. We interpret that to mean in disbarment proceedings generally.

He denies that:

(a) The particular action was properly brought in Champaign County.

(b) That notice could be lawfully served upon him in Cuyahoga County.

It will be noted that no complaint is made as to the manner of service or the sufficiency of the notice. We therefore assume that he has waived any matters of this kind by his later general appearance in the cause. See 32 *O. Jur.*, p. 512, Sec. 111; *part*

> "Objections to a defective summons, or service of summons, as well as to an entire failure of service or absence of summons, is cured by a general appearance on the part of the defendant; and the entry of a technical appearance is not necessary to that result."

It seems therefore that a solution to the problem will be found only by examining the special statutes applicable to a disbarment proceeding.

These are found in Chapter 4705 of the Revised Code which deals with attorneys.

Section 4705.01 provides in part:

> "No person shall be permitted to practice as an attorney and counselor at law, * * * unless he has been admitted to the bar by order of the Supreme Court in compliance with its prescribed and published rules. Admission to the bar shall entitle such person to practice before any court or administrative tribunal without further qualifications or license * * *"

The Supreme Court has adopted rules regulating these matters and these are found in 157 O. S., pages XLIII through LXXII.

The Chapter on attorneys further provides for the suspension or removal of an attorney as follows:

R. C. 4705.02 in part:

> "The Supreme Court, Court of Appeals, or Court of Common Pleas may suspend or remove an attorney at law from office * * * for misconduct or unprofessional conduct in office involving moral turpitude, * * * Such * * * removal shall operate as a * * * removal in all the courts of the State. * * * Judges of such state courts are *required* to cause proceedings to be instituted against an attorney when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney *practices* that he may be guilty of any of the causes for suspension, removal or reprimand." (Emphasis added)

It will be seen that the judge is under a mandatory duty (required) to cause proceedings to be brought when either of two things occur, e.g. (1) Acts come to his knowledge, or (2) When brought to his knowledge by the bar association of the county in which such attorney practices.

This statute does not state where the proceedings shall be filed but appellees believe that instructions to a judge to do a certain act mean that the thing must be done in his own court. Judges are required by statute (R. C. 2701.04) to reside within their respective jurisdictions. The Chief Justice can assign a judge to another jurisdiction (R. C. 2701.03) but it appears that otherwise his powers and duties are confined to his jurisdiction. R. C. 2301.02 provides for the number of judges for each county, and other sections appertaining to common pleas judges, their manner of election, etc. (R. C. 3513.05). All indicate that the

official acts of a common pleas judge are confined to his own county jurisdiction, except when sitting by assignment. See *Corp. Jur.* 2nd, 48 P., 1022, Sec. 58.

We conclude therefore, that knowledge coming to the attention of a common pleas judge requires that he "cause proceedings to be instituted against an attorney" in his own jurisdiction.

Since a judge is prohibited (R. C. 4705.01) from practicing law and the bringing of proceedings in his court would undoubtedly constitute the practice of law, the time-honored custom is to appoint one or more lawyers for the purpose, and R. C. 4705.05 recognizes this procedure:

> "The court in which charges or written motion is filed in accordance with sections 4705.03 and 4705.04 of the Revised Code, shall allow to the persons *appointed* to file and prosecute the charges, or to resist the modification of any decrees, for their services in either case, a reasonable sum, not exceeding one hundred dollars, to each person, together with the costs and expenses incurred by him in such proceedings. The amounts allowed shall be paid from the *county treasury of the county wherein such proceedings are had*, upon the warrant of the county auditor. If such charges or motion is filed in the Supreme Court, such allowances shall be paid from the state treasury." (Emphasis added)

Chapter 4705 further provides in R. C. 4705.03 for proceedings against an attorney:

> "Before an attorney at law is suspended or removed, or publicly or privately reprimanded, *written charges must be filed against him*, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel." (Emphasis added)

Thus a disbarment proceeding partakes somewhat of the character of a criminal prosecution in that charges are preferred and a defense is required. However, the Supreme Court in *State ex rel. Joseph v. Crossland,* 152 O. S., 199, finds that the proceeding is not one to be tried pursuant to the Criminal Code.

Since all inherent rights of courts to disbar or suspend attorneys from the practice of law have been removed by statute, the courts must follow the statute: *In re Linthicum,* 32 O. L. R., 253, Annotated following R. C. 4705.03.

We conclude therefore that the action was properly filed in Champaign County.

Petitioner is not complaining about a lack of personal service. He is complaining because it was made on him in Cuyahoga County instead of Champaign. We think had the action been filed in Cuyahoga on delicts occurring in Champaign that he would be arguing on the other side and insisting that the cause was not filed where it arose and therefore the Cuyahoga County courts were without jurisdiction.

If such arguments prevailed disciplinary actions against attorneys would be impossible. Acts could be committed in 87 counties in which they did not reside and as long as they ducked personal service in the 87 counties they would be perfectly safe. We do not believe that the legislature intended any such silly construction of its enactments.

They give us the key. An attorney is admitted to practice before any court or administrative tribunal without further qualifications (R. C. 4705.01). Traditionally an attorney is an officer of the court and if he chooses to practice in 88 counties he chooses to submit himself to the disciplinary measures of their several courts. It discredits understanding to suggest that one may identify himself as an officer of a court, claim its assistance and benefit, but

deny its right to make orders or give notices affecting him.

The statute providing for notice (R. C. 4705.03) recites "and a copy thereof, certified by the clerk, under the seal of the court, served upon him". We note that it is not a summons nor is it a subpoena. It is at most a *notice* that the charges have been filed.

We think the courts and statute law clearly distinguish between *summons* which must be served in certain specified ways and the giving of *notice* which can often be according to the method determined by the court. Notices as such are not limited to the county jurisdiction. See removal of fiduciaries, R. C. 2109.24, which provides for ten days notice without stating the manner in which it is to be served; service of notice, R. C. 2101.25. Removal of assignee or trustee for benefit of creditors (R. C. 1313.07) which is silent as to any notice being required but probably requires notice under R. C. 2109.24. In the probate of a will notices are required for "residents of the state who would be entitled to inherit". R. C. 2107.13. These are commonly served by the sheriffs of other counties. Apparently the power to appoint a receiver (R. C. 2735.01) implies the power to discharge him and this may be done at chambers. *Cincinnati S. & C. R. Co. v. Sloan*, 31 O. St., 1. The receivership statutes do not provide for any notice but the courts commonly order notice unless goods are perishable, etc. See annotation 208 following R. C. 2735.01, Page's Ohio Revised Code.

However, we are concerned with the construction of R. C. 4705.03 providing for service of the written charges upon the attorney against whom such have been filed. We believe that a fair construction requires that we examine other sections in the same chapter. R. C. 4705.01 states that admission to the bar shall entitle such person to practice before any court or administrative tribunal. That

certainly implies that the courts may be in any county in the state. R. C. 4705.03 fixes the jurisdiction in suspension or removal cases in the Supreme Court, Court of Appeals or Common Pleas Court and states that such suspension or removal shall operate in all the courts of the state. If then the admission is state wide, and the judgment of removal is state wide, a statute providing for notice in such cases must of necessity have state-wide application. Further, there is no question about the Supreme Court having state-wide jurisdiction in matters of original jurisdiction. Should we then so construe R. C. 4705.03 that it has state-wide application if the action is brought in the Supreme Court, but only district wide or county wide if brought in the lower courts when the judgment has state-wide application in any of the three courts? We think the answer is obvious and that the notice was lawfully served in Cuyahoga County.

If there is any question about disbarment coming under the provisions of the chapter on civil actions it should be settled by R. C. 2307.01 which defines action.

> "An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a *party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense.*" (Emphasis added)

Another section in this chapter provides for the title of actions. R. C. 2307.03.

> "In *every* civil action the party complaining shall be known as the 'plaintiff' and the adverse party as the defendant. The title of a cause shall not be changed in any of its stages." (Emphasis added)

Even a casual reading of these sections indicated that a disbarment proceeding is not included. In disbarment one

party does not prosecute another for the redress of a legal wrong, neither does one party seek enforcement of a legal right against another; certainly there is no attempt to punish for a public offense.

The title of a disbarment action has always been "In the matter of" and the action is for the purpose of determining the continuing fitness of the attorney to be known as an officer of the court. The primary purpose of the action is to protect the court and public from the ministrations of one, who because of moral unfitness, has forfeited a right to the court's confidence and has lost thereby his usefulness as an officer of the court. That it may operate as a punishment of the delinquent is incidental only. *In re Thatcher*, 190 Fed., 659.

QUESTION No. III

Petitioner's Question No. III contends that the trial judges erred in proceeding further, after an affidavit of bias and prejudice had been filed against them, prior to the time said affidavit was heard.

The trial in the matter of the disbarment of J. Harvey Crow commenced on April 18, 1955, and was carried on through April 18, 19, 20 and then adjourned to May 9, 1955, at which time it was carried on through May 9, 10, 11, 12 and 13, 1955, when an order of disbarment was made by the court and entered as of that date. Thereafter the matter was carried to the Court of Appeals, which found that the petitioner was entitled to separate findings of fact and conclusions of law. The order of disbarment was vacated and the matter remanded to the Common Pleas Court which was directed to make findings of fact and conclusions of law, and to re-enter such judgment as the case might

require. It was after this order of the Court of Appeals was made that the affidavit of prejudice in question was filed by Mr. Crow.

Section 2701.03 of the Ohio Revised Code, which deals with the filing of an affidavit of bias or prejudice, provided, in the last sentence thereof:

> "* * * such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

Since the trial of the matter under discussion took place during April and May of 1955 and, since petitioner's affidavit of bias or prejudice was filed almost a year after the trial of the matter, it is the contention of the Committee that the filing thereof was not timely, and that the affidavit was not effective to stop the orderly processes of the Common Pleas Court under authority of the order of the Court of Appeals.

In our case, certainly, the affidavit was not filed either at the earliest possible moment when Mr. Crow knew who the trial judges were to be, nor before the beginning of the trial.

An examination of the affidavit of prejudice filed by Mr. Crow discloses that his first seven specifications of alleged bias or prejudice occurred during the trial of the case, almost a year before the affidavit of prejudice was filed.

It is the contention of the Committee that the laws governing the filing of affidavits of bias or prejudice are intended as a shield, and not as a sword, and that a party, after participating in the trial of a matter for eight days, and after entry of judgment, and after appeal, cannot then, by the expedient of filing an affidavit of prejudice more than ten months after the trial was concluded, prevent the

judges who heard the testimony from making separate findings of fact and conclusions of law, and re-entering judgment, in accordance with the order of the appellate court.

Attention is directed to the next to the last sentence of Sec. 2701.03 of the Ohio Revised Code, which deals with the assignment of a judge in cases of prejudice, to-wit:

> "* * * The judge so assigned shall *try* such matter or cause * * *" (Emphasis added)

Obviously the statute contemplates that the question of prejudice shall be raised and disposed of prior to trial.

Reference is also made to the case of *Tari v. The State of Ohio*, 117 O. S., 481, the second syllabus of which says:

> "Such disqualification is waived unless objection be made thereto at the earliest available opportunity, and if known to the complaining party at or before the trial and if no objection be made in the trial court, will be deemed to be waived."

Quoting further from the language of the court at page 496 in the same case:

> "From the foregoing authorities and by the overwhelming weight of all authority, it is clear that the sound rule is that matters of interest or bias, or prejudice of the judge, except where it amounts to actual fraud, are to be regarded as private matters, concerning only the parties to an action, and not affecting public policy. Such matters affect only the qualification of the judge, and, if they affect the jurisdiction at all, they must relate only to the jurisdiction over the person, and not to the jurisdiction over the subject matter of the action."
>
> "By a like overwhelming authority, they are matters of privilege, and, whether they are guaranteed by a constitutional or a statutory provision, or by some principle of the common law, the privilege is regarded

as waived unless claimed at the earliest available opportunity."

Quoting further from the opinion of the court at page 491:

> "While it is well settled that jurisdiction over the subject matter cannot be conferred by consent, it is equally well settled that a submission on the part of a defendant without objection to being tried completes the jurisdiction over the person, and it is conclusively settled that such submission, followed by an actual trial and judgment, renders the judgment a finality, not subject to collateral attack, and not subject to direct attack in an error proceeding, unless the question was raised and the objection made in the trial court at or preceding the trial."

In any event, upon hearing of the affidavit of prejudice, the Chief Justice dismissed the same, and no bias or prejudice was found to exist, so that even if the alleged error complained of should be found to exist, it would not be such an error as was prejudicial to petitioner, and should be ignored.

QUESTION No. III (a)

Petitioner raises the question as to "what authority judges of the Court of Common Pleas have after court is adjourned." This situation arises due to the fact that Judges Kirk, Case and Dull, sitting by special assignment of the Chief Justice, prepared findings of fact and conclusions of law in this proceeding; prepared and placed upon record an entry in connection with said findings and filed a praecipe thereon during the period of time when said Court of Common Pleas of Champaign County, Ohio, was in adjournment.

It is true that on July 24, 1956, Judge Marion B. Owen of said local court filed with the clerk thereof the following journal entry, same being recorded in Minute Book No. 86, page 348 of said court:

"In re: the May, 1956 Term of this Court.
No. .....
Entry
Now comes the Court and declares the May, 1956, term of this Court adjourned to September 6, 1956.
Marion B. Owen
Judge"

Petitioner asserts that Judges Kirk, Case and Dull had no right, authority or power to act in the instant case because of the order of Judge Owen and while said court was in adjournment.

At this point the attention of the court is directed to Article 4, Section 3 of the Constitution of the state of Ohio:

"The Common Pleas
One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary, may be held at the time in any county. Any judge of the court of common pleas may temporarily preside and hold court in any county; and until the general assembly shall make adequate provision therefor, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas, and he may assign any judge to any county to hold court therein." (As amended September 3, 1912.)

Pursuant to authority therein granted, Carl V. Weygandt, Chief Justice, the Supreme Court of Ohio, on the seventh day of April, 1955, made formal assignment of

three judges to the Court of Common Pleas of Champaign County, Ohio, in the following matter:

"State of Ohio
Assignment
of a
Judge of the Court of Common Pleas

Hon. Paul P. Dull, a resident Judge of the Court of Common Pleas of Mercer County, Ohio, is hereby assigned to temporarily preside and hold court in the Court of Common Pleas of Champaign County, Ohio, on Monday, April 18, 1955, and to continue therein until the court business on which he enters is completed.

This assignment is made under authority of the Constitution and statutes of Ohio.

s/ Carl V. Weygandt
Chief Justice,
The Supreme Court of Ohio

Issued under the Seal of the Court at Columbus, Ohio this 7th day of April, 1955.

Filed
April 18, 1955
O. R. Outram
Clerk of Court
Champaign County
M. B. 85, Page 468"

A similar order of assignment was made as to the appointment of Judges Kirk and Case, all of said assignments being filed for record in the Court of Common Pleas of Champaign County, Ohio, on the eighteenth day of April, 1955. The attention of the court is directed to the clear language used therein:

"and to continue therein until the court business on which he enters is completed."

It is the position of the Committee as to Question No. III (a) that the orders of appointment herein set forth lifted Judges Dull, Kirk and Case out from under the

operation of the entry filed by Judge Marion B. Owen on July 24, 1956, adjourning court until September 6, 1956. Under the authority conferred on said judges by the order of appointment from the Chief Justice, their situation, while sitting by assignment in Champaign County, is analogous to that existing in those counties of this state where the Common Pleas Court is composed of more than one judge.

Questions have arisen in some counties as to when there is an adjournment of a court thus composed of several judges. In the case of *Asa Waters v. Commissioners of Hamilton County*, 9 Ohio Decisions Reprint, 5, the court said:

> "Where the rules of the Court of Common Pleas, as in Hamilton County, provide that at the end of each term a joint session shall be held, and it has been the custom at such session to formally declare the preceding term adjourned, an adjournment by one of the judges of his separate session does not end the term."

There is no question but what Judge Owen had authority to adjourn the separate session of the Court of Common Pleas presided over by him, but that said action does not, in the judgment of the Committee, adjourn, curtail or effect a continuance of the term so as to prejudice the orders of a special court sitting by assignment. To so hold would lead to inextricable confusion, loss of valuable time and much unnecessary expense. Please again note the language of the assignment: "and to continue therein until the court business on which he enters is completed."

The Committee further desires to call the attention of the court to the fact that although the court of Judge Marion B. Owen was in adjournment from July 24 to September 6, 1956, he, Judge Owen, continued to function

as a court by approving "consent entries" in several cases and by preparing and filing with the clerk of courts of Champaign County opinions in a number of cases pending in said court.

In the case of *Joseph C. Paris v. Frank M. Coppock, et al.*, 4 Ohio Circuit Decisions, 654, the following interesting language is found on page 655:

> "We are of the opinion, then, that while the entry of an adjournment sine die * * * of a separate session held by one of the judges of the court of common pleas of this county, while one or more of the other judges were holding their several terms, would not have the effect of adjourning the whole court or of putting an end to the term; yet if all of the judges holding such separate terms should, on a given day, enter upon the journals thereof an adjournment sine die, and thereafter during the time that such term might have been held (viz.: up to the time when by virtue of the law the new term must begin), there was no meeting of said judges in joint session, and nothing to show that any of said judges undertook in any way to transact business at the court house as a court, that it must be held that the term ceases as shown by the journal, in this case, on July 3, 1891."

Please note the language used: *"and nothing to show that any of said judges undertook in any way to transact business at the court house a sa court."*

Public policy generally is favorable to courts remaining open from term to term. An interesting opinion upon this particular subject is found in the case of *State v. Rohrer*, 90 Ohio State, 167, in which the Supreme Court, by the court, said:

> "that our constitution provides that all courts shall be open—that is, as public business may demand; that a great many of the counties of this state have commendably followed the plan of having one term of

court open until the succeeding term begins, to the great advantage of counsel and the public; that this common custom has existed so long and is so general as to be tantamount to the unwritten common law.

"This court believes that the policy, generally adopted by the courts of common pleas of this state, of continuous open sessions until the next succeeding term formally opens, should be continued and commended."

The Committee is further advised that at least one member of the special court was informed of the fact that the court of Judge Marion B. Owen was in adjournment. By proceeding with the preparation of findings of fact and conclusions of law and preparing and filing an entry thereon, said special court was acting pursuant to authority granted by the Chief Justice and was not subject in any way to the order of adjournment of Judge Marion B. Owen.

The Committee is of the opinion that the rights of petitioner were in no wise prejudiced by the action taken on August 16, 1956, by the special court; that this assignment of error is highly technical; that same is without merit; that the trial court should not be reversed and to so do would affect adversely not only the instant case but could affect numerous other matters which were acted upon by the Court of Common Pleas of Champaign County, Ohio, between July 24 and September 6, 1956, when said court was in adjournment; that the judgment entered on August 16, 1956, is valid and that the Court of Appeals did not commit prejudicial error in failing to reverse the trial court in this matter.

CONCLUSION

The respondent Committee respectfully concludes that the petition of J. Harvey Crow for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD P. FAULKNER,
D. HARLAND JACKMAN,
EDWIN L. ENGLISH,
RUSSELL B. HOLDING,
In Propria Persona.